Amm a/l Joy (suing as Chairman Committee Members of Wat Boonyaram) v Chuan Seng Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO K-03(1M)-62–08 OF 2017
HAMID SULTAN, BADARIAH SAHAMID AND MARY LIM JJCA
28 MARCH 2018

Tort — Damages — Trespass to land — Whether measure of damages was loss of rent from that portion of the trespassed land — Whether affected land owner proven the amount claimed as loss — Whether in absence of proof only nominal damages were payable — Whether affected land owner could not be 'compensated' for loss of rental of whole of its land when actual area trespassed comparatively small

The appellant's land shared a common border with the respondent's land. The appellant constructed buildings on his land which trespassed onto 0.28 hectares of the respondent's land. The total area of the respondent's land was 3.8251 hectares. The High Court allowed the respondent's claim against the appellant for trespass and ordered the senior assistant registrar ('SAR') to assess the damages payable. Both parties tendered valuation reports for the assessment proceedings. The respondent's report showed that the market rental value of its whole land was RM8,200 per month. It claimed as its loss the sum of RM782,200 which was RM8,200 multiplied by 96 months. The appellant's valuation report, on the other hand, assessed the market rental value of the respondent's land at RM2,000 per month. In any event, the appellant submitted that even if the respondent's valuation was used, the total damages payable was only RM57,623.04 because only the actual area trespassed, ie, 0.28 hectares, should be taken into account and not the whole of the respondent's land. The SAR accepted the respondent's valuation and awarded damages of RM782,200 for loss of rental of the whole of the respondent's land for 96 months. The decision was affirmed by the judge on appeal. The instant appeal was against the judge's decision.

Held, allowing the appeal in part and varying the damages awarded to RM57,623.04:

(1) The amount of RM57,623.04 suggested by the appellant was fair, reasonable and proportionate to the facts. The valuation reports submitted by the parties did not differ in any substantial sense in their comparable values and the conclusions reached. It appeared that the lands in the locality of the respondent's land were generally used as scrapyards or as car-wash or shops selling car accessories and that the fair market value was in the range of RM600 per month. In the absence of

any evidence to the contrary and on the prevailing facts, the loss had to be calculated according to the actual land area that was used by the appellant. The respondent could not expect to be compensated for trespass of the whole of its land when that was not true on the facts. The damages awarded by the High Court were based on the total acreage of the land when the area affected was only 0.28 hectares. Using the respondent's rental valuation of RM8,200 per month, and based on the trespassed area of 0.28 hectares, the result was RM57,623.04 (see paras 36, 38 & 44–47).

(2) The High Court judge failed to undertake an examination of the valuation reports submitted by the parties and to examine the evidence and make a reasoned decision. He had merely held that the SAR was entitled to choose one valuation report over the other. There was failure to evaluate and consider if there was indeed any loss proven. The burden was on the respondent to prove its loss. Where there was failure to prove the fact and amount of the loss, only nominal damages would be awarded. Apart from alleging that there was a loss of rental and that it was not able to sell or rent the land, the respondent did not offer any other evidence. On the evidence, any compensation payable to the respondent was only nominal and the amount of RM57,623.04 suggested by the appellant was suitable as nominal damages (see paras 28–29, 34, 39–41 & 49).

[Bahasa Malaysia summary

Tanah perayu berkongsi sempadan dengan tanah responden. Perayu membina bangunan atas tanahnya yang mana menceroboh ke tanah responden sebanyak 0.28 hektar. Jumlah keseluruhan keluasan tanah responden adalah 3.8251 hektar. Mahkamah Tinggi membenarkan tuntutan responden terhadap perayu kerana menceroboh dan memerintahkan penolong kanan pendaftar ('PKP') untuk menilai ganti rugi yang boleh dibayar. Kedua-dua pihak mengemukakan laporan penilaian untuk prosiding penilaian. Laporan responden menunjukkan bahawa nilai sewa pasaran terhadap keseluruhan tanahnya adalah RM8,200 sebulan. Ia menuntut sebagai kerugiannya sejumlah RM782,200 yang mana adalah RM8,200 didarab dengan 96 bulan. Laporan penilaian perayu, sebaliknya, menilai nilai sewa pasaran terhadap tanah responden adalah pada RM2,000 sebulan. Walau bagaimanapun, perayu berhujah bahawa walaupun penilaian responden digunakan, keseluruhan ganti rugi yang boleh dibayar adalah hanya sebanyak RM57,623.04 kerana hanya kawasan sebenarnya yang dicerobohi, iaitu, 0.28 hektar, patut diambil kira dan bukan keseluruhan tanah responden. PKP menerima penilaian responden dan mengawardkan ganti rugi sebanyak RM782,200 bagi kerugian sewa terhadap keseluruhan tanah responden bagi 96 bulan. Keputusan disahkan oleh hakim atas rayuan. Rayuan ini adalah terhadap keputusan hakim tersebut.

Diputuskan, membenarkan sebahagian rayuan dan mempelbagaikan ganti rugi yang diawardkan kepada RM57,623.04:

(1) Jumlah sebanyak RM57,623.04 yang dicadangkan oleh perayu adalah adil, munasabah dan bersesuaian dengan fakta. Laporan penilaian yang dikemukakan oleh pihak-pihak tidak berbeza dalam mana-mana makna substansial dalam nilai yang boleh dibandingkan mereka dan kesimpulan yang dicapai. Nampaknya bahawa tanah di kawasan tanah responden adalah digunakan secara umum sebagai kawasan simpanan sekerap atau sebagai tempat cuci kereta atau kedai-kedai menjual aksesori kereta dan bahawa nilai pasaran adil adalah dalam lingkungan RM600 sebulan. Di dalam ketiadaan apa-apa keterangan bertentangan dan atas fakta lazim, kerugian perlu dikira mengikut kepada kawasan tanah sebenar yang digunakan oleh perayu. Responden tidak boleh mengharapkan untuk diberi pampasan untuk pencerobohan keseluruhan tanahnya apabila ia bukanlah benar atas fakta. Ganti rugi yang diawardkan oleh Mahkamah Tinggi adalah berdasarkan atas jumlah keseluruhan keluasan tanah apabila kawasan yang terjejas adalah hanya sebanyak 0.28 hektar. Menggunakan penilaian sewa responden sebanyak RM8,200 sebulan, dan berdasarkan kawasan yang dicerobohi adalah sebanyak 0.28 hektar, keputusan adalah RM57,623.04 (lihat perenggan 36, 38 & 44–47).

(2) Hakim Mahkamah Tinggi gagal untuk menjalankan pemeriksaan terhadap laporan penilaian yang dikemukakan oleh kedua-dua pihak dan untuk memeriksa keterangan dan membuat keputusan yang sewajarnya. Beliau hanya memutuskan bahawa PKP berhak untuk memilih satu laporan penilaian ke atas yang satu lagi. Terdapat kegagalan untuk menilai dan mempertimbangkan jika ia sebenarnya terdapat apa-apa kerugian yang dibuktikan. Beban adalah ke atas responden untuk membuktikan kerugiannya. Di mana terdapat kegagalan untuk membuktikan fakta dan jumlah kerugian, hanya ganti rugi nominal patut diawardkan. Selain daripada mendakwa bahawa terdapat kerugian terhadap sewa dan bahawa ia tidak dapat menjual atau menyewa tanah tersebut, responden tidak menawarkan apa-apa keterangan lain. Atas keterangan, apa-apa pampasan yang boleh dibayar kepada responden adalah hanya jumlah nominal dan jumlah RM57,623.04 yang dicadangkan oleh perayu adalah sesuai sebagai ganti rugi nominal (lihat perenggan 28–29, 34, 39–41 & 49).]

Notes

For cases on trespass to land, see 12(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 374–381.

Cases referred to

Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd [2007] 5 MLJ 697; [2007] 6 CLJ 93, FC (refd)

Cottrill v Steyning and Littlehampton Building Society [1966] 2 All ER 295, QBD (refd)
Devenish Nutrition Ltd and others v Sanofi-Aventis SA (France) and others [2008] 2 All ER 249; [2007] EWHC 2394 (Ch), Ch D (refd)
Inverugie Investments Ltd v Hackett [1995] 3 All ER 841, PC (refd)
Mawar Biru Sdn Bhd v Lim Kai Chew [1992] 1 MLJ 336, HC (refd)
Othman bin Ali & 290 Ors v Bukit Lenang Development Sdn Bhd [2016] 3 MLJ 708; [2016] 6 CLJ 508, CA (refd)
Sin Heap Lee — Marubeni Sdn Bhd v Yip Shou Shan [2005] 1 MLJ 515; [2004] 4 CLJ 35, CA (refd)
Stoke-on-Trent City Council v W & J Wass Ltd [1988] 3 All ER 394, CA (refd)
Swordheath Properties Ltd v Tabet and others [1979] 1 All ER 240, CA (refd)
Toyo Textiles Industries Sdn Bhd & Anor v Lian Foong Housing Dev (M) Sdn Bhd [1986] 1 MLJ 412 (refd)

Appeal from: Civil Suit No 22–245 of 2007 (High Court, Alor Setar)

Jeyasingam Balasingam (Kartikumar Seamreasan and Bun Liang a/l Saw Ah Seng with him) (Ghazi & Lim) for the appellant.
Dhanaraj Vasudevan (Devandra Balasingam with him) (Kamil Hashim Raj & Lim) for the respondent.

Mary Lim JCA (delivering judgment of the court):

INTRODUCTION

[1] This appeal arose out of an appeal to the judge on an award of damages assessed by the learned senior assistant registrar. Upon careful consideration of the submissions and records of appeal, we, unanimously, allowed the appeal in part and varied the decision of the learned judge.

BACKGROUND

[2] The facts and circumstances that led to the assessment of damages merit some elaboration. The case involves two plots of land, Lots 2813 and 76. The respondent who was the plaintiff in the proceedings before the High Court is the owner of Lot 2813, Mukim AH, Daerah Kubang Pasu, Kedah while the appellant is the registered owner of Lot 76. The appellant's lot is located in the middle of Lot 2813. Both plots share a common border.

[3] The appellant utilised Lot 76 as a place of worship known as 'Wat Boonyaram', and has built several buildings including a columbarium, crematorium, library, toilets and hostels on Lot 76. These buildings however, encroached onto the respondent's Lot 2813. The respondent successfully sued

A the appellant for trespass. The decision of the High Court which ordered damages for trespass to be assessed, was affirmed on appeal and leave to appeal to the Federal Court was refused.

B **[4]** The assessment of damages was conducted by the learned SAR based on affidavit evidence. The respondent tendered a valuation report which assessed the respondent's loss at RM782,200 based on a market rental value at RM8,200 per month for a total of 96 months from 2007–2015. On the other hand, the valuation report tendered by the appellant assessed the market value to be RM2,000 per month based on comparisons with five other nearby C properties giving a total sum of RM192,000. The appellant submitted that even if the respondent's valuation is used, damages should be assessed at RM57,623.04. This sum is calculated on the actual area trespassed, that is, 0.28 hectares and not on the whole of Lot 2813 measuring 3.8251 hectares or 411,730 sqft.

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[5] The learned SAR accepted the respondent's valuation and awarded damages of RM782,200, for the whole of Lot 2813. This decision was affirmed on appeal by the learned judge.

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[6] According to the learned judge, the learned SAR was entitled to prefer and accept one valuation report over the other, 'so long as the report was reasonably acceptable to the circumstances of the case'. After perusing the valuation report, the learned judge found the market value of RM8,200 per F month as 'reasonable' and saw 'no reason to depart from this finding' as comparisons had been made with six adjacent properties. The learned judge added that the sum was 'reasonable considering the surrounding circumstances of this case'. Those circumstances being:

G (a) the appellant had not acted within reasonable time to remove the infrastructures after receiving a demand from the respondent;

(b) the infrastructures constructed by the appellant could not be easily removed; that the removal of the columbarium and crematorium 'would be very difficult and it could possibly attract public outcry'; and

H (c) there was evidence elicited during the trial that the appellant had obtained undue monetary benefit from the unlawful use of the respondent's land by selling niches to the public.

DELIBERATIONS AND DECISION OF THIS COURT

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[7] In our judgment, while the learned judge may have started out right in identifying the correct legal principles, the learned judge fell into error in its application and in his exercise of appellate discretion. It was erroneous for the learned judge to have taken into account the circumstances mentioned in the

preceding paragraph when considering the fair market rental value for the trespassed land. Not only were the matters mentioned by the learned judge not the complaints of the respondent, the court was not looking to awarding any punitive or exemplary damage. Where conduct is concerned, it must also be of all parties involved.

[8] This court in *Othman bin Ali & 290 Ors v Bukit Lenang Development Sdn Bhd* [2016] 3 MLJ 708; [2016] 6 CLJ 508 had occasion to consider the relevant legal principles that are applicable when assessing damages in a claim for trespass. The facts in *Othman bin Ali* are these.

[9] The respondent had purchased certain land for commercial development. The appellants numbering 291 individuals were amongst 400 odd squatters who had unlawfully occupied the respondent's land. The appellants claimed that they had entered into valid sale agreements with the previous owner of the land from whom the respondent purchased the land. After a full trial, judgment was entered for the respondent. The respondent was granted vacant possession and damages was ordered against the appellants. The appellants lost their appeal before the Court of Appeal.

[10] The learned SAR assessed damages at RM63,873,000. This sum is said to represent the respondent's loss of use of land calculated at 5% of the value of the land from 1996–2008. The '5% of the value of the land' was a formula applied in *Toyo Textiles Industries Sdn Bhd & Anor v Lian Foong Housing Dev (M) Sdn Bhd* [1986] 1 MLJ 412.

[11] On appeal, the whole award was set aside. The appellants successfully convinced the Court of Appeal that the whole award was erroneous on principle and on the facts. The Court of Appeal agreed with the appellant that the respondent had failed on 'all counts' and that the respondent's claim for damages was 'unsustainable on evidence and ought to have been rejected outright'. The reasoning of the court on the applicable principles when assessing and awarding damages for trespass is most insightful.

[12] At para [31], the Court of Appeal said:

> It was undeniable that in a normal case where once a trespass to land or a deprivation of use of land had been established, the normal measure of damages to be applied would be the actual proof of 'loss of rental' or a reasonable estimation of such a 'rental return' that was directly attributable and flowing from a lawful use of the land but denied by that wrongful action. This was consistent with the two underlying principles in law which required that any damage awarded would, so far as money can, put the affected or deprived party in the same position as he would have been if the tort had not occurred subject to the further overriding consideration that such damages to be awarded was in any event not too remote or speculative in nature.

[13] The Court of Appeal further opined at para [33] that for there to be any award of damages, it was incumbent on the respondent to adduce:

(a) credible evidence indicative of the projected 'profits' the plaintiff had been denied by the fact that the land could not be developed as was intended (ie when it was purchased);

(b) alternatively, reliable evidence of either what would represent a fair rental at market rates that the plaintiff would have in all probability earned from the particular area of the land that was occupied respectively by each of the defendants, or what would be a fair rental benefit that would have likely accrued to each of the defendants from the respective areas within the land that each of them had wrongly occupied.

[14] The Court of Appeal first found that the respondent had in fact suffered no loss. While the respondent may have been 'de facto deprived of the physical use of the land by reason of the presence of the defendants and other unlawful occupiers thereto', the land had markedly appreciated in value in the interim period between the time of the respondent's purchase, and the date of judgment or assessment of damages. The appellants claimed that any loss or damage suffered by the respondent 'had been more than adequately compensated in any event by such increase on the market value of the land'. The decision of *Mawar Biru Sdn Bhd v Lim Kai Chew* [1992] 1 MLJ 336 was cited in support. The Court of Appeal agreed with that argument finding that there was no diminution in the value of the land that was directly caused by the appellant's trespass to parts of the respondent's land.

[15] The Court of Appeal next rejected the wholesale application of the '5% of market or capital value of the land' without proper critical analysis of its basis and crucial evidential support fatal to the decision reached. Applying *Cottrill v Steyning and Littlehampton Building Society* [1966] 2 All ER 295, the court held that since the land was purchased for commercial/building purposes, the measure of 'loss' suffered where that purpose was impeded had to be established by reference to the profits contemplated or expected, had the development gone through in time. For a proper assessment of damages to be undertaken, there must be 'some evidence to show how the acts of the defendants in wrongfully occupying the land (or parts of it) had frustrated the commercial or business interest of the plaintiff in the envisaged planned development of the whole area comprised in the land'. Such evidence was found to be 'lacking in this case'.

[16] A further reason was the respondent's failure to adduce any evidence on what would be a fair rental that the respondent could have expected from the land. Since the rate of rentals was quite dependent on conditions such as location and market supply and demand forces, evidence of rentals must be offered. The court further found that there should have been apportionment of

liability for such damages as between the 291 appellants with reference to the specific areas each of them occupied. According to the court, there should have been demarcation and identification of the actual area occupied or trespassed.

[17] At para [34], the Court of Appeal quite categorically found that the respondent had failed to 'put forward before the court any such evidence' for a proper assessment of damages to be undertaken:

> ... In the absence of such relevant material being placed before the Court, SAR-2 ought not to have ordered the sweeping damages, as the Court did here, implicating all the defendants without further taking into consideration the fact that the plaintiff had only been deprived of the use of such actual area in the land occupied by each of the defendants.

[18] What may be concluded from the Court of Appeal's decision in *Othman bin Ali* is that while damages for trespass is awarded for loss, actual proof of loss is still required. Generally, that would be in the form of rental as the unlawful occupation has adversely affected the intention or ability to let or lease out the land in question. If that were not available, then, damages would be based on 'a reasonable estimation of such a 'rental return'. In either case, the loss must also be directly attributable and flowing from the loss of a lawful use of the land but for the unlawful occupation or trespass. This means the damages to be awarded must not be too remote or speculative.

[19] We note that in setting out the correct principles for measuring damages for trespass, the Court of Appeal had cited with approval the Privy Council decision in *Inverugie Investments Ltd v Hackett* [1995] 3 All ER 841. This was an appeal from the Bahamas Court of Appeal. In considering how damages for the tort of trespass are to be assessed, the Privy Council, through Lord Lloyd of Berwick said:

> ... that although the plaintiff might not have suffered any actual loss by being deprived of the use of property, he was still entitled to recover a reasonable rent for the wrongful use of his property by the trespasser, and similarly, even if the trespasser might not have derived any actual benefit from the use of the property, he was still obliged to pay a reasonable 'rent' for the benefit or use he enjoyed based on what has been termed as the 'user principle'.

[20] Lord Lloyd of Berwick further said:

> ... of the landlord of residential property, can recover damages from a trespasser who has wrongfully used his property whether or not he can show that he would have let the property to anybody else, and whether or not he would have used the property himself. The point is well expressed by Megaw LJ in *Swordheath Properties Ltd v Tabet* [1979] 1 All ER 240 at 242; [1979] 1 WLR 285 at 288 as follows:
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> > It appears to me to be clear, both as a matter of principle and of authority, that in a case of this sort of the plaintiff, when he has established that the defendant has

remained on as a trespasser on residential property, is entitled, without bringing evidence that he could or would have let the property to someone else in the absence of the trespassing defendant, to have as damages for the trespass the value of the property as it would fairly be calculated; and, in the absence of anything special in the particular case it would be the ordinary letting value of the property that would determine the amount of damages.

It is sometimes said that these cases are an exception to the rule that damages in tort are compensatory. But this is not necessarily so. It depends how widely one defines the 'loss' which the plaintiff has suffered. As the Earl of Halsbury LC pointed out in *Mediana (owner) v Comet (owners), The Mediana* [1900] AC 113 at 117; [1900–3] All ER Rep 126 at 129, it is no answer for a wrongdoer who has deprived the plaintiff of his chair to point out that he does not usually sit in it or that he has plenty of other chairs in the room.

In *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 3 All ER 394 at 402; [1988] 1 WLR 1406 at 1416 Nicholls LJ called the underlying principle in these cases the 'user principle'. The plaintiff may not have suffered any actual loss by being deprived of the use of his property. But under the user principle he is entitled to recover a reasonable rent for the wrongful use of his property by the trespasser. Similarly, the trespasser may not have derived any actual benefit from the use of the property. But under the user principle he is obliged to pay a reasonable rent for the use which he has enjoyed. The principle need not be characterised as exclusively compensatory, or exclusively restitutionary; it combines elements of both.

[21] Since trespass is actionable per se, once trespass has been proved, whether the claimant can show he could have let out the property to another person, or whether he would have used the property himself, is in fact, immaterial. The claimant is entitled to damages for the trespass without bringing evidence of such intentions. In the absence of anything special, it would be the 'ordinary letting value of the property that would determine the amount of damages' as held by Megaw LJ in *Swordheath Properties Ltd v Tabet and others* [1979] 1 All ER 240.

[22] Nicholls LJ had also stated of the same in unequivocal terms in *Stoke-on-Trent City Council v W & J Wass Ltd* [1988] 3 All ER 394:

> It is an established principle concerning the assessment of damages that a person who has wrongfully used another's property without causing the latter any pecuniary loss may still be liable to that other for more than nominal damages. In general, he is liable to pay, as damages, a reasonable sum for the wrongful use he has made of the other's property.

[23] We do not propose to go into the question of whether the award of damages in trespass is compensatory or restitutionary depending on whether it is viewed on a 'loss' or a 'gain' basis (described as the '*Rashomon* effect' in *The User Principle — Rashomon Effect or Much Ado about Nothing* by Kelvin FK Low (2016) 28 SAcLJ 984; see also discussions by the English Court of Appeal

in *Devenish Nutrition Ltd and others v Sanofi-Aventis SA (France) and others* [2008] 2 All ER 249; [2007] EWHC 2394 (Ch)). A

[24] That discourse would be unnecessary since the respondent's allegations in this appeal (see affidavits filed in support of the assessment hearing), that the appellant had benefited from its trespass when it collected substantial sums in the sale of niches in the columbarium, were not made with a view to requiring the appellant to account profits made from the wrongful use of the land; or for a disgorgement of those profits, under the law of restitution. Those allegations were made by the respondent for the purpose of showing that the appellant was financially able to pay damages. And, this is where the learned judge fell into error when he took that into consideration without more. B C

[25] In any case, those allegations were denied by the appellant. The appellant had adduced evidence of sales of the niches by one Saw Kok Oon, brother to Saw Choo Ping @ Saw Kok Bin, the deponent of the affidavit filed on behalf of the respondent. Saw Kok Oon had since absconded with the monies from such sales. Saw Kok Oon has since been declared a bankrupt. The appellant had made a police report on Saw Kok Oon's misdeeds, sued him and filed a proof of debt in respect of its claims on the collections. See p 32 of record of appeal Part B and pp 83–114 and 117 of record of appeal Part C. D E

[26] For the purposes of this appeal, suffice for us to say that the user principle applies, that the appellant must pay damages for its improper use of the respondent's land, or for the use which the appellant has enjoyed. In our judgment, that would be the cost of use of the land. F

[27] What that cost is to be is also a matter of proof. While the respondent may be entitled to damages 'without bringing evidence that he could or would have let the property to someone else in the absence of the trespassing defendant', the respondent is not necessarily entitled to 'have as damages for the trespass the value of the property as it would fairly be calculated'. In the present appeal, that is not, in any case, the respondent's submissions — that the damages awarded must represent the value of the land trespassed. We understand from the respondent's valuation report, the land is valued at RM9m (see p 179 record of appeal Part C). The respondent is not making a claim for damages based on loss of value of land. What the respondent is claiming is a sum representing the loss of rentals for the use of its whole piece of land. G H I

[28] In our judgment, although the appellant is required to pay 'a reasonable sum for the wrongful use he has made of the other's property' which 'in the absence of anything special in the particular case it would be the ordinary letting value of the property that would determine the amount of damages', the

A burden is always on the respondent to lead evidence on what that reasonable sum should be. Without any evidence before the court, it would be pure speculation or guesswork on the part of the court to say what the 'reasonable rent' or 'fair rent' is to be in any given case. It is still incumbent on the respondent to lead evidence to prove damages, to prove what the fair rent B should be. And, that is why in the case of *Othman bin Ali*, the Court of Appeal strived to examine the evidence presented, found no evidence of loss and demarcation of loss; and to finally allow the appeal and make no award of compensation at all.

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[29] Further, we are of the firm view that where a plaintiff makes a positive assertion that he has suffered loss and has laid down the reasons, explanations, and circumstances of that loss, those reasons etc must be examined. If a plaintiff claims that he had intention to rent out his land but was deprived of that D opportunity, then evidence must be led to establish that loss. While the fact of loss is presumed in the tort of trespass, the amount of loss that is recoverable is still very much a matter of proof borne by the respondent. Where the respondent is unable to prove, then only nominal damages ought to be awarded. None of the authorities cited before us is of the opinion that damages for trespass is always more than nominal. It is nominal where there is a failure E to prove the fact and the amount of loss.

[30] In the present appeal, when the High Court allowed the respondent's claim on 15 November 2011, it ordered damages to be assessed by a senior F assistant registrar ('SAR'). At prayers (v) and (vi) of the reliefs sought by the respondent in its statement of claim, the respondent claims special and general damages. No sum is, however, specified for the claim for specific damages.

[31] In an affidavit deposed by Swa Choo Ping @ Saw Kok Bin on 8 March G 2012, the respondent claimed that it had suffered loss totaling RM1.2m as a result of loss of rental of RM25,000 per month from years 2007–2011. This sum was later reduced to RM782,200 following the valuation report prepared by its appointed valuers, Messrs Rahim & Co — see affidavit in reply by the respondent affirmed on 24 November 2015.

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[32] In this second affidavit, the respondent asserted that it was not able to sell or rent Lot 2813 due to the appellant's trespass. The respondent further asserted in this affidavit that the appellant was financially able to pay the sum claimed due to the number of niches sold by the appellant.

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[33] This was disputed by the appellant. In the appellant's second affidavit in reply, the appellant challenged the respondent's valuation report, claiming that the fair market value is RM2,000 per month, and that any compensation in any event, must be based on actual area trespassed. Since the area that was

actually occupied by the appellant was 0.28 hectares (30,407 sqft) out of 3.8251 hectares (411,730 sqft), the calculation of damages must be suitably proportioned.

[34] We find that other than the assertion that there was a loss of rental and that it was not able to sell or rent the land, the respondent did not offer any other evidence in the form of discussions with potential buyers, tenants or lessees. There was certainly no intention to develop the land; it was never the basis of the respondent's claim for loss anyway. Contrast this with the case of *Sin Heap Lee — Marubeni Sdn Bhd v Yip Shou Shan* [2005] 1 MLJ 515; [2004] 4 CLJ 35 where exemplary damages were also awarded in place of declaratory and injunctive orders and where the trial judge had disposed of both the question of liability and quantum in the same proceedings.

[35] Instead, the land remained in the state that it had always been. It was agricultural land located within a Malay reservation with an express condition for rubber estate (see p 179 of record of appeal Part C) but the respondent had planted oil palms instead. The respondent also had a detached house on the land. Both the palm trees and the house remained undisturbed.

[36] Since the respondent had no such intention, the measurement of loss must take into account only the actual area affected. The respondent cannot expect to be compensated for trespass of the whole of its land when that is not true on the facts. Neither is it the evidence of the respondent that its whole land was disaffected or that it was deprived of its use of the whole of the land. As we can see from the respondent's own valuation report, the respondent was not at all adversely affected in respect of the balance of its land, which was substantial. Any award of damages must never be a windfall or disproportionate. It is not the intention of the law of damages that it should be punitive, especially in the case of general damages. Instead, the compensatory elements must always prevail — see *Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd* [2007] 5 MLJ 697; [2007] 6 CLJ 93.

[37] Consequently, it was not a matter of choosing between one valuation report over another, or for any of the reasons cited by the learned judge. Those reasons were not the basis of the respondent's claim or complaints; they were also not the basis of the learned SAR's considerations in making the award.

[38] As was the case in *Othman bin Ali*, there must be proper demarcation of the area trespassed. This was not done in the present appeal. The award of damages was instead based on the total acreage of the land when the area affected was only 0.28 hectares (30,407 sqft) out of 3.8251 hectares (411,730 sqft).

[39] Based on the user principle, the respondent's loss on the facts, translates to rental or cost of use of its land by the appellant. Aside from the affidavits filed, valuation reports were prepared by both parties to deal with the measure and calculation of damages for loss of use. We do not see any examination of any of the two valuation reports by the learned judge save the comment that the SAR was entitled to choose one over the other.

[40] Unfortunately, that is not correct. It is not a matter of preference. Examination and reasons for rejection, acceptance or preference based on sound judicial principles must be given. If there is none, then the learned judge, sitting in appeal, must examine that evidence himself and make a reasoned decision. Had the learned judge conducted that exercise, as we have in this appeal, the learned judge will find, as we have found, relevant evidence of the characteristics of the land and its surrounding location that have a determinative influence on the fair value of rental. We further find that the respondent's conduct in the matter ought to have been examined. Had that been undertaken, the learned judge would have found acquiescence relevant to the determination of fair market rental of the land.

[41] Having regard to all these considerations, any compensation to the respondent can only be nominal. In this respect, we find the amount suggested by the appellant, that is, the sum of RM57,623 suitable as nominal damages.

[42] In any case, this is our evaluation of the valuation reports. The valuation report prepared by the respondent suggested six market rental values of comparable lots ranging from RM350–RM1,000 per month, depending on size of land and its use. Of the six lots offered, only four were in actual occupation and use. The use varied from offers for rental as residential land (RM700 per month or RM0.080 psf/month) or commercial land (RM1,000 per month or RM0.172 psf/month) to actual rentals for car wash (RM600–RM1,000 per month or RM0.55 psf/month — RM0.14 psf/month).

[43] The appellant's valuations based on four comparable lots, ranged from RM600 per month (RM0.06 psf/mth) to RM1,900 per month (RM0.095 psf/mth). The comparable lots were also used for similar activities such as scrapyards and car accessory shop as well as offer for use on the basis of vacant agricultural lands.

[44] We find that the two valuation reports actually did not differ in any substantial sense, in their comparable values and the conclusions reached. It would appear that the lands in the locality of the respondent's land were

generally used as scrapyards or carwash or shops selling car accessories. That would mean that the fair market value would be in the range of RM600 per month.

[45] We further agree that, in the absence of any evidence to the contrary and due to the prevailing facts, the loss must necessarily be calculated according to the actual land that is used by the appellant.

[46] Using the respondent's valuation, that would be the sum of RM57,623.04 calculated as follows:

RM8.200.00 x 0.28 hectares = RM600.24 p/mth x 96 mths 3.8251 hectares

[47] This amount of RM57,623.04 is, in our view, fair, reasonable and proportionate to the facts.

[48] We make one final observation on the assessment of RM782,200 that was awarded by the learned SAR and confirmed by the learned judge. This sum was also disproportionate to the value of the property. According to the respondent's own valuation, the whole piece of land was valued at RM900,000.

[49] For all the reasons set out above, we unanimously found merits in the appeal. We found this was a fit and proper case for appellate intervention. There was plainly an improper exercise of discretion on the part of the learned judge sitting on appeal from the SAR's decision. There was a failure by the learned judge to evaluate and consider if there was indeed any loss proven.

[50] The appeal is consequently allowed in part. The decision of the learned judge is varied accordingly.

[51] We order no interest on the damages of RM57,623; that there be no order as to costs and that the deposit be refunded.

Appeal allowed in part and and damages awarded varied to RM57,623.04

Reported by Ashok Kumar